# JURISDICTION OVER NON-RESIDENTS IN PERSONAL ACTIONS.

In the Congress of Lawyers, held at St. Louis last September, Sir William R. Kennedy, one of the Judges of the High Court of Justice of England, made an address on the question, "To what extent should judicial action by courts of a foreign nation be recognized?" The subject is of special interest in this country, where every State is in a legal sense a foreign jurisdiction to every other. We have, indeed, the unifying rule of the Constitution which requires that in each state full faith and credit shall be given to the judicial proceedings of every other, but this is subject to certain limitations arising out of the very nature of judicial proceedings, and, with respect to judgments of different states as well as with regard to judgments of different nations, the courts must decide what those limitations should be, and the decision of the courts on this question depends on the same principles in the one case as in the other. In both cases, for example, fraud in obtaining the judgment is regarded as sufficient reason for not giving effect to it in another state, or country; in both cases the question may be asked whether the court which pronounced the judgment had jurisdiction of the cause, and in both cases it must be determined whether that question should be decided by the court that pronounced the judgment or by the court that is asked to enforce it.

Sir William Kennedy considered the subject with especial reference to the status of individuals as affected by divorce or other decrees, and the right to represent the person or property of others, but he spoke also of the basis of jurisdiction in actions *in personam*, and in speaking on this subject he made some observations which seem to suggest that there is a difference of emphasis, at least, in the treatment of the subject by the Courts of the United States and those of other countries.

Seeking to formulate a rule which would express the irreducible minimum of the requirements of a foreign judgment which the courts of any country should give effect to, he said:

"It must appear to the court which is asked to give effect to it, that

A. It has been pronounced by a court of competent jurisdiction;

B. It is final, or, as continental jurists term it, executory, in the country in which it is pronounced;

C. It does not decree anything and does not give effect to a claim which itself is contrary to the public policy or law of the country in which it is sought to enforce it.

Provided always that the tribunal before which the question of enforcement is raised should treat the judgment as invalid, if it is shown to have been obtained by fraud."

All these requirements are insisted upon by the courts of this country in dealing with judgments of different states, as well as of foreign countries, and the rule as an expression of the irreducible minimum would be approved by our courts; but it will be observed that in this rule there is no express statement of the rule laid down by the Supreme Court of the United States in Pennoyer v. Neff,[1] and declared in many other cases by the State as well as the Federal courts in this country, that without service of process within the territory, no jurisdiction can be obtained to pronounce a money judgment in an action *in personam* against a non-resident who does not appear.

The point was not overlooked, it is needless to say, by Judge Kennedy. He goes on to say:

"Ought proof also to be required by the court from which enforcement is sought, that the parties were duly cited, and, if it was a judgment by default, that the party against whom it was pronounced had been made aware of the action and had the opportunity of defending himself? I have not suggested such a condition because in the first place, so far as regards the observance of its own prescribed procedure, we might apply, I am inclined to think, the rule '*omnia presumuntur rite esse acta*' and not allow the contrary to be alleged except as an element of fraud in the obtaining of the judgment, and in the second place, because the only objection on the plea that the prescribed procedure was itself improper (or, as the point has sometimes been put, 'inconsistent with natural justice') which ought, in my humble judgment, to be entertained, will be found, I think, really to be objections to the international competence of the tribunal."

"It is beyond controversy that, in the absence of an international agreement as to the rules of competence, it is right and also consistent with the comity of nations that the court which is asked to give effect to a foreign judgment, should satisfy itself that the tribunal which gave the judgment belonged to a country whose sovereign—in the language of Mr. Dicey (Conflict of Laws, pp. 33, 36, 39)—might in accordance with the principles maintained by the court which is asked to enforce the judgment, rightly adjudicate upon the matter in which the judgment was given. It

[1] (1877) 95 U. S. 714.

is, I am afraid, equally beyond controversy that the principles which are maintained by courts of law as to international competence of jurisdiction are not everywhere the same."

He refers to the fact that English and American courts would not regard as internationally competent the *forum actoris* given to Frenchmen by Art. 14 of the Code Napoleon,[1] nor accept the claim of the courts of Scotland to ground jurisdiction in an action *in personam* on the mere possession of property within the territory,[2] and he says:

"Nothing except an international convention can create a uniform criterion of the competency of the jurisdiction of the adjudging tribunal." Then he goes on to say that, assuming that no question of want of jurisdiction can be raised and that the party against whom judgment has passed is found to have been rightly treated as subject to the jurisdiction of the foreign court, it seems to be clear that he is bound by the ordinances of the foreign court with respect to citation and procedure, and that when sued abroad he should not be allowed to find a defence in the opinion of the Court where he is sued, that the procedure was not what it should have been. "There is no recognized natural justice with regard to legal procedure, and in dealing with civilized countries we must assume that their rules, though not perhaps in accordance with our notions, do not constitute a violation of morality and natural justice."

This statement assumes that jurisdiction may be obtained quite independently of the question of service of process within the territory. The argument is that assuming the defendant is found to have been rightfully treated as subject to the jurisdiction, the propriety of the process may be left to the court which rendered the judgment. It is clear from this that Sir William Kennedy had in mind that something else than the service of process within the territory might properly serve as the basis of jurisdiction, and that he was unwilling to maintain that the service of process within the territory was a necessary test of the international validity of a judgment in an action *in personam*.

[1] Schibsby *v.* Westenholz (1870) L. R. 6 Q. B. 155; Westlake Priv. Int. Law, p. 347.

[2] Dicey Conf. Laws, p. 380.

It is true that Sir William Kennedy is speaking of what he calls the irreducible minimum of the requirements of judgments that are to have international validity, and that he does not say that some nations do not insist upon other conditions, but it is an interesting and significant fact that he made no reference, even in an address made in the United States, to the fact that in this country, by a long course of decisions in the State and Federal courts, the service of process within the territory has been made an essential requirement of a judgment that is to have recognition beyond the territory of the court by which it is pronounced.

These decisions in this country have been based not on any local considerations, and not alone on the language of the Constitution, but on the idea that any other rule would be contrary to the fundamental principles of the law of jurisdiction and against natural justice, and that for that reason proceedings which did not conform to this rule would not be due process of law. If this doctrine were generally accepted, it would follow that in all nations in which it is sought to base jurisdiction upon the principles of natural justice, the same rule would prevail, and yet Sir William Kennedy, speaking from his experience in the English courts and after a careful study of the statutes and decisions of the courts of other countries, is unwilling to insist that the service of process within the territory is essential to jurisdiction in actions *in personam.*

This brings sharply to our attention the fact that the rule adopted in the United States has not been fully accepted in England and on the continent of Europe, and that, whatever the rule may be with respect to the international competence of judgments, it is by no means agreed that a judgment *in personam*, valid within the sovereignty, may not be obtained even against a non-resident without service of process within the territory. In England the same general principles are accepted with respect to the basis of jurisdiction as in the United States. The principles are those of the common law, and the rules adopted in the United States are based upon the early decisions of the English courts. Both the English and the American courts accept the statement of Judge Story, who said in his work on the Conflict of Laws, " By the common law of England

and the United States, there can be, as a general rule, no jurisdiction unless it be founded on the fact of either the person or the thing being within the territory,"[1] but the English courts of recent years have made an important departure from this rule and have refused to apply it when, by statutes or by rule of court having the force of statute, authority is given to serve notice on non-residents beyond the seas, and so far as regards the effect to be given to the judgment by the English courts, at least with respect to British subjects, the question of jurisdiction is made to depend upon the rules and statutes rather than upon the general principles on which jurisdiction is founded. In countries not governed by the common law, there is no general rule that jurisdiction in personal actions is based upon service of process. The rule of the Roman Law was "*actor sequitur forum rei*," but the forum was either the forum of the origin or of the domicile of the defendant, and this rule has been departed from in modern codes. Jurisdiction is based upon nationality or upon the place of the making or of the performance of the obligation. In the Code Napoleon the *forum actoris* is regarded as the proper place for bringing an action, and in France to-day the principle of nationality prevails and the courts are considered as established for the protection of the rights of Frenchmen and they are not required to entertain jurisdiction in suits between foreigners.

A discussion of the principles on which the courts of Continental Europe assume jurisdiction over non-residents would carry us too far for our present purposes. There is some discussion of it in Sir William Kennedy's paper, and there is a recent article in the *Harvard Law Review* by A. Pillet, of the University of Paris,[2] on jurisdiction in actions between foreigners which shows the difference of the point of view between the French courts and those of England and the United States in considering the jurisdiction over non-residents. He says:

"Jurisdiction of English courts over personal actions depends on rules quite different from those which governed Roman and still control French law. More than that, the very spirit of these rules and the manner of their

[1] Story Conf. of Laws, § 539.

[2] 18 Harv. Law Rev. 325. March, 1905.

construction belongs to systems very far apart. In France (as formerly in Rome) one asks first if the French courts have jurisdiction ; the primary question out of the way, the law gives the complainant a way of summoning him. In England and in America the process is reversed; one seeks first to find out if the writ of summons (l'assignation) can be legally delivered to the person wanted (personal service) or something equivalent done (substituted service). Then, once it is established that the writ can be regularly served, the jurisdiction of the court naturally follows. In France we should call that putting the cart before the horse."

M. Pillet speaks of the practice of the English and American courts as distinguished from that of the French. We can only speak here of the difference between the practice of the English courts and that of the American courts under the rule laid down by the Supreme Court of the United States in Pennoyer *v.* Neff.

In England, as well as in the United States, the general principle is that the service of the writ or something equivalent thereto is essential as the foundation of the court's jurisdiction in actions *in personam.*[1]

The general rule laid down by Lord Ellenborough in Buchanan *v.* Rucker[2] and by Best, C. J., in Douglas *v.* Forrest[3] was asserted by Judge Story in Picquet *v.* Swan[4] and in his work on the Conflict of Laws[5] and in a recent case quoted by Sir William Kennedy, Earle Selborne said[6] "All jurisdiction is properly territorial and "*extra territorium jus dicenti impune non paretur.*" "A court has no jurisdiction over an absent foreigner even though served with process and formerly resident of the state in which the action is brought. The defendant is under no obligation to obey the summons and it may be regarded as a nullity, except (when authorized by special local legislation) in the country of the forum in which it was pronounced." It is this exception, as we shall see, that makes the difference between the decisions in this country and those in England.

Professor Dicey speaking of the English law declares the rule to be that " when the defendant in an action *in personam* is, at the time for the service of the writ, not in England the court has (subject to the exceptions, hereafter mentioned) no jurisdiction to entertain the action." "At common law,"

[1] Dicey Conf. Laws. [2] (1808) 9 East 192. [3] (1828) 4 Bingh. 686.
[4] (1848) 5 Mason 35. [5] 5 Story Conf. Laws, § 538 *et seq.*
Sirdar Gurdyal Singh *v.* Rajah of Faridkote [1894] A. C. 670.

he adds, "a writ could never be served on a defendant when out of England[1] and in an action *in personam*, this common law doctrine is still (subject to definite though wide exceptions) maintained." He goes on to say, however: "This common law principle has been modified by rules of court made under statutory authority by the judges, and in very many actions, perhaps numerically in the majority of actions, service can be effected on, *i. e.* the court exerts jurisdiction over, a defendant who is out of England."

It is in this modification of the common law rules that the English law with respect to jurisdiction over non-residents in actions *in personam* has become different from that which prevails in this country. There are statutes in this country as well as in England providing for service or publication of notice to non-residents and there are statutes here which expressly authorize personal judgments against non-residents on service or even publication of notice beyond the limits of the sovereignty by which the court is constituted, but under the decisions of the Supreme Court of the United States such judgments are of no effect for the seizure of property even in the state in which they are pronounced.

In Pennoyer *v.* Neff,[2] a local statute provided for notice by publication, and for judgment *in personam* on a money demand against a non-resident defendant who had property in the state, and the court had jurisdiction of the subject of action. The Supreme Court held that although the local statute authorized the procedure, the judgment was of no effect and that property could not be seized or execution issued under it. The Court said that although property could be made subject to the jurisdiction of the courts of a state by means of proceedings taken directly against the property, yet jurisdiction to pronounce a personal judgment could not be acquired by reason of the existence of property within the state; that the property could not be taken by force of such a judgment, and that, since the Fourteenth Amendment, the validity of such a judgment might be directly questioned and its enforcement resisted. This decision, as we have said,

[1] Dicey Conf. Laws, p. 237, citing *In re Busfield* (1886) 32 Ch. Div. (C. A.) 123, 131, judgment of Cotton, L. J.

[2] (1877) 95 U. S. 714.

has been followed and affirmed in many cases in the State and Federal Courts, and it is now pretty generally conceded that such judgments must be held invalid by the courts of the state in which they are pronounced even though they are expressly authorized by the Legislature.

In Massachusetts it has been held that under these decisions of the Supreme Court, and in view of the Fourteenth Amendment, a judgment rendered in Massachusetts against a non-resident not served with process is void for want of jurisdiction, and may be reversed on writ of error,[1] and may be shown to be void[2] by pleadings and proofs in a suit upon the judgment.

In New York, a judgment against a non-resident was set aside on petition, when it was made to appear that he had not authorized the appearance that was entered for him nor had any notice of the pendency of the suit.[3]

In New Jersey,[4] the Court of Errors and Appeals has gone so far as to hold that a bill must be dismissed as against a foreign corporation not served with process within the State although it was made a party only with a view to restoring to it property alleged to have been wrongfully transferred to another corporation within the State. The property was not real estate, but only patent rights, and the court regarded the suit as one *in personam* and not *in rem*, and held that the absent defendant had not been brought before the court by due process of law.[5]

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[1] Eliot *v.* McCormick (1887) 144 Mass. 10.

[2] Needham *v.* Thayer (1888) 147 Mass. 536.

[3] Vilas *v.* Plattsburgh & Montreal R. R. Co. (1890) 123 N. Y. 440.

[4] Wilson *v.* American Palace Car Co. (1903) 65 N. J. Eq. 730.

[5] The cases are too numerous to be referred to here. They are cited in Rose's Notes to the Supreme Court Reports, under Pennoyer *v.* Neff, Vol. 9, page 336 to 349, Sup. vol. 2, p. 101–107; and in the Century Digest, Vol. 13, 1847–1877, Vol. 30, col. 2505–2671; 19 Ency. Pl. & Pr. 572, 603, 605.

The following may be especially noted: Freeman *v.* Alderson (1886) 119 U. S. 185; York *v.* Texas (1890) 137 U. S. 15; Kauffman *v.* Wootters (1891) 138 U. S. 285; Grover & Baker S. M. Co. *v.* Radcliffe (1890) 137 U. S. 287; Dull *v.* Blackmar (1898) 169 U. S. 243; Roller *v.* Holly (1900) 176 U. S. 398; Hart *v.* Sansom (1884) 110 U. S. 151; Golden *v.* Morning News Co. (1895) 156 U. S. 518, 521; Cooper *v.* Newell (1899) 173 U. S. 555; Darrah *v.* Watson (1872) 36 Iowa 116; Fitzsimmons *v.* Johnson (1891) 90 Tenn. 416; Mackay & Lusher *v.* Gordon (1870) 34 N. J. Law 286; Moulin *v.* Insurance Co. (1853) 24 N. J. Law 222; Smith *v.* Colloty (1903) 69 N. J. Law 365, 371; Reel *v.* Elder (1869) 62 Pa. St. 308; Scott *v.* Noble (1872) 72 Pa. St. 115; Ralston's Appeal (1880) 93 Pa. St. 133; Borden *v.* Fitch

In these decisions there was no discussion of the nationality or citizenship of the parties, or of the place of making, or the place of performance of the contract, or of the place where the cause of action arose, as the basis of the competence of the court to take jurisdiction of the controversy. The emphasis was laid entirely upon the service of the process upon the defendant within the territory in which the action was brought. There are cases in which it was held that, when the defendant was residing within the territory, service at his place of residence, under the rules of practice governing the court, would be a basis of jurisdiction, even though he was not found there,[1] and in these cases the residence of the defendant is perhaps regarded as his domicile and as analogous to nationality and as rendering the defendant subject to the laws of the State relating to legal procedure; but in most cases the rule laid down is that personal service of process is necessary to jurisdiction,[2] and the question of the place of origin of the liability sued on is not considered. In England, on the other hand, statutes and rules of court authorizing service of process beyond the territory are accepted as a sufficient warrant for the exercise of jurisdiction and the judgments are regarded as binding in the English Courts without regard to the question whether they ought to be recognized by the courts of other nations.

The English courts do not take the ground that service of process beyond the jurisdiction is not due process of law or that it is contrary to natural justice to enter a judgment against a non-resident on notice served on him in a

(1818) 15 Johns. 121; Schwinger *v.* Hickok (1873) 53 N. Y. 280; Mahr *v.* Norwich Union Fire Ins. Society (1891) 127 N. Y. 452; Lovejoy *v.* Albee (1851) 33 Me. 414; York *v.* Texas (1889) 73 Tex. 651, 11 S. W. Rep. 869; Porter *v.* Hill County (Texas 1895) 33 S. W. Rep. 383; Munger *v.* Doolan (Conn. 1903) 55 Atl. Rep. 169; Bissell *v.* Briggs (1813) 9 Mass. 462; Needham *v.* Thayer (1888) 147 Mass. 536.

An article on Jurisdiction over Foreign Corporations by Edw. Q. Keasbey may be found in 12 Harvard Law Review, p. 1.

For leading cases, see 1 Beale's Cases on Conflict of Laws.

[1] Morrison *v.* Underwood (1849) 5 Cush. 52; Henderson *v.* Staniford (1870) 105 Mass. 504; Glover *v.* Glover (1850) 18 Ala. 367; Hervey *v.* Hervey (1897) 56 N. J. Eq. 166; S. C. Ibid. (1898) 424; Mackay *v.* Lusher & Gordon (1870) 34 N. J. Law 286; Huntley *v.* Baker (1884) 33 Hun 578.

[2] Hart *v.* Sansom (1884) 110 U. S. 151; Goldey *v.* Morning News (1895) 156 U. S. 518, 521.

foreign country. The courts themselves have made the rules under which they act in directing service of notice abroad, and there has been developed a definite and well ordered system based on principle, as well as on practical considerations, by which the English courts take jurisdiction over non-residents in certain classes of actions *in personam* as well as in suits relating to property within the territory.

The statutory provisions intended originally for giving notice to non-residents in suits in equity relating to property in England, have been extended to suits at law relating to causes of action arising in England, and to many other cases of purely personal demands, and on the consolidation of the courts, the rules relating to service out of the jurisdiction were formulated without regard to the distinction between law and equity. The principles and practice of service out of the jurisdiction have been discussed in a long line of cases, and have been made the subject of an elaborate and learned treatise, by Francis Taylor Piggott of the Middle Temple,[1] in which, by the way, no reference is made to the line of decisions in the United States.

This discussion of the subject in cases and text books is interesting and important for us in this country at this time, in view of the apparent tendency of the courts to apply the doctrine of Pennoyer *v.* Neff,[2] to cases in which they are not bound under the Constitution to accept it as law and in view of the great practical necessity there is for giving some effect to service of notice beyond the limits of the several states within one country. It may be interesting, therefore, to give some account of the English statutes and rules of court on the subject and to refer to some of the leading cases.

The act of 2 Will. IV, c. 33, and 4 and 5 Will. IV, c. 82, provided for notice to non-residents in suits in equity for the enforcement of liens on land or on the public stocks. This provision was similar to those that were made at an early day in this country for publication of notices in suits

[1] Service out of the jurisdiction, by F. T. Piggott, London, William Clowes & Son (1892) pp. lxxii; 262.

[2] (1877) 95 U. S. 714.

for foreclosure of mortgages and afterwards in suits in equity generally.[1]

With respect to this English statute, Lord Westbury in Cookney *v.* Anderson,[2] held, that where it appears on the face of the bill that, at the time suit was brought, the defendant was resident in a foreign country, and that the suit does not relate to any of the subjects in which the court is warranted in exercising jurisdiction against persons so resident, the defendant may demur to the jurisdiction.

The thirty-third of the Consolidated Orders of 1845 was not confined to suits concerning land and stocks, but gave the court a discretion, according to the circumstances of the case, to permit service of the subpœna abroad. Of this Vice Chancellor Wigram said:[3]

"The question of international law and the effect foreign courts will give the judgment need not be considered. The only question is whether the general order gave the court power to make the order in this case. The order gives the court power to make the order in all cases. The material question in judicial proceedings is whether the defendant had due notice and not whether he received it at Dover or Boulogne."

Lord Westbury's opinion was criticised, and Vice Chancellor Wigram's was followed, by Lord Chelmsford in Drummond *v.* Drummond,[4] where it was said that the rules of court had the force of statutes, and the question was not what service out of the jurisdiction ought to be authorized, but what had been authorized, and that the question of the effect of the judgment belonged to the courts of the defendant's residence. In Whaley *v.* Busfield,[5] Lord Justice Cotton said:

"If any act of Parliament gives [the courts] jurisdiction over British subjects, wherever they may be, such jurisdiction is valid; but, apart from statutes, a court has no jurisdiction over any person beyond its limits."

These cases were suits in equity and the orders were analogous to our statutes providing for publication in equity cases.

[1] In New Jersey the first statute providing for an order of publication was passed September 26, 1772, and referred especially to mortgagors who withdrew themselves from the Province; Allinson's Laws, page 373. See also act of March 12, 1798; Paterson, Laws, page 303, and the act of February 29, 1820; Rev. (1821) p. 702, Elmer's Dig. 60.

[2] (1863) De G. J. & S. 365. [3] Whitmore *v.* Ryan (1846) 4 Hare 612.

[4] (1866) L. R. 2 Ch. App. 32. [5] (1886) 32 Ch. Div. 123, 131.

The Common Law Procedure act of 1852 made provision for judgments against non-residents in actions at law in certain cases; this was not limited to suits against British subjects, and the only difference made between British subjects and foreigners was that in case of the former, the writ of summons itself might be served abroad while in case of the latter, notice of the writ must be served. The statute authorized a judgment to be entered against a defendant served with summons or notice abroad, in case the judge was satisfied by affidavit that there was a cause of action which arose within the jurisdiction or in respect to a breach of contract made within the jurisdiction. Chapter 85 Sec. 42 of 20-21 Victoria, makes this provision expressly applicable to a foreigner by domicile or origin.[1] Under these acts the jurisdiction of the court was based not upon the nationality of the defendant nor upon the service of process upon him within the territory, but upon the fact that the defendant entered into a contract in England or committed in England the act out of which the cause of action arose. Referring to these acts, Cresswell, J., said in Simonin *v.* Mellac[2] "The parties, by professing to enter into a contract in England, mutually gave to each other the right to have the force and effect of the contract determined by the English tribunal," citing Huberus, 65 Tit. 1, and referring to John Voet, Boullenois, Donellus, and Story.[3] This, however, had reference to a contract of marriage.

On the consolidation of the courts of law and equity in 1875, orders regulating procedure were made by the courts under authority of Parliament; these orders were remodelled in 1883, and service of summons or notice outside of the jurisdiction is now authorized and regulated by Order

[1] See Smith's Actions at Law (1857) p. 66.

[2] (1860) Swabey & Trist, 67; 6 Jur. N. S. 561.

[3] Judge Story, in the passage cited says: "There is no pretence to say that such modes of proceeding can confer any legitimate jurisdiction over foreigners who are non-residents and do not appear to answer the suit whether they have notice of the suit or not. The effects of all such proceedings are purely local, aud elsewhere they will be held to be mere nullities." Story, Conf. Laws 760, citing Ferguson *v.* Mahon (1839) 11 Ad. & El. 179; Buchanan *v.* Rucker (1808) 9 East 192; Smith *v.* Nichols, 9 Bing, N. C. 208; Douglas *v.* Forrest (1828) 4 Bing. 686; Don *v.* Lippmann (1837) 5 Cl. and Fin. 1. See also Wharton Conf. Laws, 712, 714.

XI, rules 1 and 2, made in 1883, and Order XLVIII A, rules 1–11, made in 1891. Order XI, rule 1, declares that service out of the jurisdiction of a summons or notice of summons may be made by the court or a judge in seven specified cases. Some of these relate to cases involving property within the jurisdiction or persons domiciled or ordinarily resident there. Three of the clauses are as follows:

> Whenever (*e*) "The action is founded on any breach or alleged breach, within the jurisdiction of any contract, wherever made, which according to the terms thereof ought to be performed within the jurisdiction unless the defendant is domiciled or ordinarily resident in Scotland or Ireland," or (*g*) "Any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction," or (*f*) where an injunction is sought as to any thing to be done within the jurisdiction, or where any nuisance within the jurisdiction is sought to be prevented, or removed, whether damages are or are not also sought in respect thereof.

These rules make distinct provision for service outside of the jurisdiction in certain classes of actions *in personam*, and under these rules the English courts hold themselves bound to pronounce judgment against parties served with summons or notice abroad, even though they are non-residents and are not British subjects.

(In the case of British subjects the summons itself must be served and in other cases notice of the summons.)

Under these orders the English Courts have taken jurisdiction in actions purely *in personam* against non-resident foreigners in cases in which the only basis of jurisdiction was that the contract "ought to be performed" in England, although there was no property in England which was the subject-matter of the suit. In Robey *v.* Snaefell Mining Company,[1] it was held that when an engine maker in England sold machinery to a company domiciled in the Isle of Man, where the machinery was delivered, the price was payable in England and the contract was one that ought to be performed in England, and leave was granted to serve the writ in the Isle of Man. In Hewitson *v.* Fabre[2] when goods were delivered in England to a Frenchman residing in Bordeaux no question was made but that leave to serve notice of the writ would have been given, but it was held that service of the writ itself was a nullity. In

[1] (1887) 20 Q. B. Div. 152. [2] (1888) 21 Q. B. Div. 6.

Rein *v.* Stein in the Court of Appeals [1] it was held that leave should be given to serve notice of a writ abroad on a German subject carrying on business in Hamburg in an action for the price of goods sold to him in Germany by a merchant doing business in England. There are many cases to the same effect where no question is made as to the jurisdiction of the English Court over a foreigner nor as to the extra territorial effect of the judgment, but leave to serve notice of the writs is given if it appears that the contract "by the terms thereof ought to be performed within the jurisdiction".[2]

In one case where a contract was made and to be performed in India and there were several parties, some in Great Britain and one in India, the court said that convevience required that the case should be tried in England and approved an order for service out of the jurisdiction.[3]

On the other hand in a case in which the jurisdiction was based on an application for an injunction against doing an act in England, leave to serve notice in France was refused when it appeared that the suit was an action by a Frenchman against a Frenchman on a matter governed by French Law and arising out of a contract made in France.[4]

Under the Common Law Procedure acts the court refused to construe the language to include foreign corporations, and judgment could be rendered only against British subjects and foreigners resident abroad, but Order XI of the rules of 1875 has been held to apply to any non-resident defendant, whether a person or a foreign corporation.[5] The English courts, however, are cautious in directing service to be made abroad, even upon British subjects and they do not ignore the general principle governing juris-

[1] (1892) 1 Q. B. 753.

[2] See Fry *v.* Raggio (1891) 40 W. R. 120. Reynolds *v.* Coleman (1887) 36 Ch. D. 453. Bell *v.* Van Antwerp and Brazil Line (1891) 1 Q. B. 103. Barrow *v.* Meyers (1888) 4 T. L. R. 441.

[3] Harris *v.* Fleming (1879) 13 Ch. Div. 208.

[4] Société Générale de Paris *v.* Dreyfus (1885) 29 Ch. Div. 239 (1887) 37 Ch. Div. 215.

[5] Westman *v.* Aktiebolaget Ekmans Mekaniska Snickarefabrik (1876) 1 Exch. Div. 237. Scott *v.* Royal Wax Candle Co. (1876) 1 Q. B. Div. 404.

diction. In Great Australian Gold Mining Co. *v.* Martin,[1] where an order was asked against a public official residing in Australia, Bramwell, J. A., said:

"The court must observe some caution in requiring a British subject to come from a distant colony to answer a case in England. An affidavit must be required showing a cause of action in England. 'Bearing in mind that (as applied to a foreigner) unless we were careful we might be assuming a jurisdiction which would be treated by a foreign government as a nullity, I think the court ought to require satisfactory evidence before issuing the writ.'"

There is another rule of court (Order IX, rule 6) relating to service in suits against partnerships in the firm name and as to this there has been a question whether it was intended to apply to firms consisting wholly or partly of foreigners residing abroad. In considering this the courts have considered the question of jurisdiction and of the power of Parliament to legislate with respect to foreigners.

In Russell *v.* Cambefort in the Court of Appeal[2] Lord Justice Cotton with the concurrence of Fry, L.J. and Lopez, J., said:

"Although an act of Parliament can give jurisdiction to the court against British subjects; as to foreigners, Parliament has not and does not assume to have jurisdiction against those who are residing abroad and have not submitted to the jurisdiction of the English Courts. Therefore, in construing the rule, we must have regard to what Parliament has power to do, and, in my opinion, we should be wrong in construing it as giving jurisdiction against those who are in no way subject."

This was followed in Western National Bank of New York *v.* Perez.[3]

In this case the firm had no place of business in England and all its members were domiciled and resident abroad, but one of them was served with process in England under rule 6 of Order IX. Bowen, L.J., and Lindley, J., held that this rule did not apply, but that service of notice might have been made under Order XI in a suit against the individual partners by name, but Lord Esher was of opinion that service on the partners in England was good as against the firm. So also in Dobson *v.* Festi, Rasini & Co.[4] it was held that Order IX, rule 6, did not apply to foreign part-

[1] (1876) 5 Ch. Div. 1. [2] (1889) 23 Q. B. Div. 526.
[3] [1891] 1 Q. B. 304. [4] [1891] 2 Q. B. 92.

nerships or enable a plaintiff by serving one partner abroad to enter judgment against the firm.

A change in the rules was made in 1891, and Order XLVIII A, with eleven rules, was adopted in the place of Order IX, rule 6, and other orders relating to the suits against firms. The new order referred to firms carrying on business within the jurisdiction and service at the place of business is to be deemed good service on members of the firm, whether any of the members are out of the jurisdiction or not. It does expressly include foreigners resident abroad, and there was a question whether, in view of the decision in Russell *v.* Cambefort, it was to be construed as applicable to others than British subjects.

The earlier cases on this question are discussed by Mr. Piggott in his book on "Service Out of the Jurisdiction" written in 1892. He says:

"There are strong hints conveyed in some of them that the whole process of service out of the jurisdiction, in its accepted interpretation as applicable to foreigners, is wrong. But there are many opinions of other Judges in the contrary sense, and the decisions of the courts make it clear beyond question that there is an intention to include foreigners within its operation. But this leads to two constitutional questions of great gravity. Is this inclusion of foreigners in excess of what has been called the well-known limitation to the power of Parliament? And if it is, are the courts bound to enforce the provisions of such an enactment?"[1]

In 1894 the new rule came before Lord Esher and the other judges in the Queens Bench Division.[2] He held that reading the new with the old, it is now immaterial whether the writ is against an English firm or against a foreign or colonial firm, and the only question is whether the firm carries on business within the jurisdiction. If it does, whether it is an English or a foreign firm, a writ may be

[1] Piggott, Service Out of the Jurisdiction. The cases referred to on this subject are the following: Russell *v.* Cambefort (1889) 23 Q. B. Div. 526; Credits Gerundeuse *v.* Van Weede (1884) 12 Q. B. D. 171; re Anglo African Co. (1886) 32 Ch. D. 348; Exp. Blain re Sawers (1879) 12 Ch. D., 522; Cookney *v.* Anderson (1863) 1 De G. J. & S. 365; Western Nat. Bank of the City of New York *v.* Perez [1891] 1 Q. B. 304; Dobson *v.* Festi [1891] 2 Q. B. 92; Indigo Co. *v.* Ogilvy [1891] 2 Ch. 31; Lysagt *v.* Clark [1891] 1 Q. B. 552; Heinemann *v.* Hale [1891] 2 Q. B. 83; Grant *v.* Anderson [1892] 1 Q. B. 108; Appleton *v.* Donovan (1891) 7 T. L. R. 554.

[2] Worchester City and County Banking Co. *v.* Fairbank, Paulding & Co. [1894] 1 Q. B. 784.

issued against the partners in the firm name. The defendants were in a British colony, but Lord Esher said that for the purpose of this decision nothing turned on whether the defendants owed allegiance to the Queen. There was no discussion of the principles of territorial jurisdiction, but Davey, L. J., said: "These provisions appear to me to form a clear and reasonable code of rules with regard to suing and enforcing judgment against a partnership which is carrying on business under the protection of our law."

Shortly before this a case was decided by the Privy Council,[1] in which the court's approval was given to the statutes by which the courts of New Zealand are allowed to proceed without service of notice of the writ when the defendant is absent in an action upon contract to be performed within the colony. The court said it was proper that the courts should, in any case of contracts made or to be performed in New Zealand, have the power of judging whether they will or not proceed in the absence of the defendant. In answer to the argument that a judgment so obtained could not be enforced beyond the limits of New Zealand, Lord Hobhouse said that it was not relevant, and that the test of the validity of the statutes was whether they tended to promote the peace, order and good government of New Zealand.

The English courts recognize that they cannot pronounce a valid judgment when they have not jurisdiction, but under the orders of court permitting service to be made on a foreigner abroad in cases relating to contracts made in England or to be performed in England, they do not admit that the service of process within their own territory is essential to jurisdiction, nor that the service of a foreigner abroad in a suit on an English contract is not due process of law. In ex parte Blain in re Sawers, in the Court of Appeals, James, L. J., said:[2]

"If you make a contract in England under a particular act of Parliament, a particular procedure may be taken by which we may effectually try the question of that contract or that breach and give an execution against any property of yours in the country, but that is because the property is within the protection and subject to the power of the English law. To what extent the decision of such a question would be recognized abroad remains to be considered and must be determined by the tribunal abroad."

[1] Ashbury *v.* Ellis [1893] A. C. 339. [2] (1879) 12 Ch. Div. 522.

With respect to the international validity of judgment, Earl Selborne, in his opinion quoted in the early part of this article,[1] recognizes the rule prevailing in the United States, that a judgment in an action *in personam* will not be recognized in a foreign nation if the defendant (not being a subject) was not served with process within the territory, and he says that no exception is made in favor of the country in which the contract was made or to be performed, but that in these cases as well as all others the courts of the country in which the defendant resides have the power, and they ought to be resorted to to do justice. He does say however, that judgments against non-residents in actions *in personam* will be recognized in the country of the forum by which they are pronounced if they are authorized by local statutes.

It is precisely on this point, as we have said, that the recent decisions in the United States are at variance with the decisions of the courts of England. The decision in Pennoyer *v.* Neff[2] was that the judgment in Oregon obtained in accordance with the laws of Oregon was invalid in Oregon when tested in a court of the United States. There was in that case no suggestion of jurisdiction based on nationality or citizenship or of a contract made or to be performed there. The action of the court was sought to be justified on the ground that there was property within the state on which execution might be levied and this was condemned by the Supreme Court and the property levied on was declared to have been taken without due process of law and in violation of the Fourteenth Amendment. This decision involving a provision of the Constitution regulating the judicial action in the several States is binding upon the State Courts and the ruling has therefore been followed in the Courts of the State and State Courts have held that judgment so rendered in pursuance of the statutes regulating their own procedure were void as against non-residents and subject to be reversed on error.[3]

But it is to be observed that it is only when property is taken that the Fourteenth Amendment applies. In York *v.*

[1] Sirdar Gurdyal Singh *v.* Rajah of Faridkote [1894] A. C. 670.

[2] (1887) 95 U. S. 714.

[3] Needham *v.* Thayer (1888) 147 Mass. 536; Wilson *v.* Palace Car Co. (1903) 65 N. J. Eq. 730; Eliot *v.* McCormick (1887) 144 Mass. 10.

Texas[1] the Supreme Court declined to reverse a judgment conceded to be void against a non-resident, saying that the protection of the Fourteenth Amendment could only be invoked when an attempt should be made to deprive the party of his property. The State Courts may properly say, as was said in Needham *v.* Thayer, that they will not sustain a judgment which it is unlawful to execute; but it by no means follows that the State court must declare that all provisions of their statutes for service out of the jurisdiction are of no effect in actions *in personam*. They may refuse to set aside an order of publication in such cases, as was done in New Jersey in Kirkpatrick *v.* Post,[2] and in view of the English decisions we have referred to, they may well consider whether, as a matter of principle, there is not something else than service within the territory which may properly be made by legislative sanction the basis of jurisdiction in certain cases, and whether it is contrary to natural justice to provide, as the English Rules of Court provide, that one who makes a contract within the State should be subject to suit on that contract within the State on actual notice given to him in a neighbouring State. It is especially important in this country, where business and social relations are not divided by State lines, that the limits of jurisdiction should not be defined more sharply than justice and sound principle require, and there is great danger of miscarriage of justice if no State can acquire jurisdiction in cases where the necessary parties defendant reside in different States. It may be well in certain classes of cases to take jurisdiction, when authorized by statute, so far as to attempt to bring all parties before the court and leave it to be determined on the decree whether the jurisdiction is rightfully acquired; and even after decree, the constitutional rights of non-residents may be asserted when an attempt is made to take property under execution. Property may not be taken without due process of law, and the Supreme Court has decided that a judgment against a non-resident not served with process without any basis of jurisdiction beyond a statute providing for publication or notice abroad is not due process of law; but this decision does not preclude the State courts from entering

[1] (1890) 137 U. S. 15. [2] (1895) 53 N. J. Eq. 591.

judgment so long as no property is taken in execution and until it comes to the question of taking property, the State courts are technically, at least, at liberty to determine for themselves whether the statutes of their own States defining the cases in which notice of process may be served abroad do not in fact constitute due process of law. If, for example, the State statutes are like those adopted in England in the Common Law Procedure Act of 1852 and provide for service outside of the State "in causes of action which arose within the jurisdiction and in respect to a breach of a contract made within the jurisdiction," must it be said, before any attempt to take property is made, that a service of reasonable notice in a neighboring State is contrary to natural justice and is not due process of law? The jurisdiction of the forum of the obligation is recognized in systems based on the Roman law and is recognized in England in the statutes providing for notice to non-residents. If, in the nature or the subject matter of the contract, there is a local basis of jurisdiction, there is at least respectable authority in the English and Continental courts for sustaining the validity of statutes based on such a theory of jurisdiction even though they may provide for services of notice on non-residents abroad. These considerations may be applicable in dealing with the liabilities of stockholders and directors of corporations and of other cases of like character in which it may fairly be assumed that the non-resident by entering into the contract or association or relation within the jurisdiction submitted himself to the laws governing the transaction and to the judgment of the courts of the State or country.

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